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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ELIZABETH CLEVENSTINE,

Plaintiff and Appellant,

v.

PROFESSIONAL SECURITY  
CONSULTANTS et al.,

Defendants and Respondents.

D056205

(Super. Ct. No. 37-2008-82503-CU-  
PO-CTL)

APPEAL from judgments of the Superior Court of San Diego County, Luis R.  
Vargas, Judge. Reversed.

On February 10, 2008, in the late afternoon, plaintiff and appellant Elizabeth Clevenstine (Plaintiff) was in the process of getting packages from her car in a busy San Diego mall parking structure when she was grabbed by an unknown assailant, who told her to get in the car trunk and when she resisted, viciously stabbed her. She brought this personal injury action against defendants and respondents, mall owner UTC Venture,

LLC (UTC), and its retained security firm of Professional Security Consultants (PSC; sometimes together Defendants), on theories of premises liability and negligence in providing some, but inadequate, mall security, in light of numerous known incidents of thefts and some third party violent acts against customers in the parking lot areas, making it reasonably foreseeable that additional protective measures should be taken.<sup>1</sup>

Defendants each brought successful summary judgment motions alleging Plaintiff could not prove essential elements of her case, duty and/or causation, and Plaintiff appeals. (Code Civ. Proc., § 437c; all statutory references are to this code unless noted.) The trial court analyzed the record presented, acknowledging that various theft and personal confrontation theft incidents had occurred and been reported at the mall area during the past few years, but determined that they did not amount to any sufficient showing of any prior similar criminal conduct on the premises, such as would support imposition of a duty on Defendants to provide additional visible security measures on the property. The court distinguished the other known incidents of theft and personal confrontation offenses on the grounds that they had different features, such as occurring in nearby parking areas, or did not involve this level of physical injury or any injury, or did not involve the use of weapons. The court accordingly concluded this violent daytime assault by a stranger was not reasonably foreseeable. This resolved both the negligence and premises liability claims as matters of law.

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<sup>1</sup> Plaintiff also sued Nordstrom, near where the attack occurred, and Nordstrom also obtained summary judgment in its favor. Nordstrom was dismissed and is not a party to this appeal.

On appeal, Plaintiff contends the trial court erred in determining Defendants were under no duty to install and conduct additional visible security measures, whether operative or inoperative (e.g., decoy cameras), because the prior incidents should not have been found to be distinguishable in that manner, as failing to provide any notice that additional security measures might be required at the premises. Plaintiff contends it is reasonably foreseeable such theft crimes involving personal confrontations may escalate into assaults, such as she suffered, and accordingly, these Defendants had a duty to respond to previous reports of such offenses (robbery and purse snatching) by providing a higher degree of security measures. She argues the trial court erred as a matter of law in granting Defendants' summary judgment motions on duty grounds, and additionally, that triable material issues of fact exist regarding breach of duties and causation of harm.

We agree with Plaintiff that the trial court erroneously analyzed well accepted duty criteria, and that summary judgment must be reversed on those grounds. This record supports a conclusion, as a matter of law, that Defendants had a duty to provide visible security measures at a reasonable level at this location, in light of all the circumstances known to them. We will accordingly reverse the summary judgment granted on duty grounds, returning the matter for further proceedings on the remaining elements of Plaintiff's case. We cannot decide on the current record whether any breach of the enumerated duty to provide visible security measures occurred, nor do we reach the alternative causation analysis.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. Attack on Plaintiff; Complaint

The underlying facts of the attack and the extent of security that was provided at the UTC mall that day are essentially undisputed, allowing the duty question to be addressed as an issue of law. On February 10, 2008, at approximately 4:10 p.m., Plaintiff drove to the outer edge of the top level of Structure D, a two-level parking structure next to Nordstrom, left her car, and walked toward the mall entrance. The shopping center is located in the northern division of the city, for police coverage purposes, and it has a lower rate of crime than other areas of the city.

Parking Structure D is located at the outskirts of the three million square foot mall, two million square feet of which are parking areas. Structure D has a ramp for vehicles to access the second level of the parking lot, and pedestrian access is available through stairways at three corners of the structure and two entryways to Nordstrom. The two levels of Structure D are sometimes referred to as upper D lot and lower D lot. The ramp is blocked off at night. Alongside Structure D is a surface lot, separated by a driveway, called outer lot D. Diagonally across from Structure D is another surface lot, Lot C.

UTC contracts with PSC to provide mall security services. At the relevant time, a total of five trained guards were on duty, some of whom patrolled the parking areas in golf carts, while others patrolled mall areas on foot. Officer Roybal, one of the PSC parking lot guards, made his scheduled rounds approximately every half hour, including the upper level of Structure D, and he had been there about a half hour before Plaintiff was attacked.

After parking her car on the upper level of Structure D, near the outer end, Plaintiff started walking toward the mall, near the Nordstrom entrance. She noticed there was a man dressed in dark clothes wearing a beanie cap, who seemed "creepy" to her. She then realized she had forgotten to get her return packages out of the trunk, and turned back to her car. As she opened the trunk, she was grabbed from behind in a bear hug, and she began to struggle against her attacker, believed to be the man in the dark clothes and beanie. He told her, "Get in the trunk, bitch," and she resisted, whereupon he stabbed her in several places and dislocated her shoulder in the struggle.

Several bystanders noticed there was an attack going on and one of them ran toward it, waving his arms and screaming. Just as this was occurring, Officer Roybal was driving up the ramp toward the upper level of Structure D. The attacker turned and ran toward one of the staircases and disappeared down it. Plaintiff ran toward the Nordstrom entrance, and collapsed, bleeding heavily. Another bystander, fortuitously a trained trauma nurse, treated her wounds. Officer Roybal called for backup, police arrived about five minutes later, and Plaintiff was taken to the emergency room for treatment of her grave injuries. Closed circuit camera surveillance from one camera attached to the upper level of a nearby building did not reveal any useful information. The attacker has never been found.

Later, Plaintiff sued UTC and PSC, as well as Nordstrom, for personal injuries based on theories of premises liability and negligence. She contended the assault upon her, as a patron, was reasonably foreseeable due to the occurrence of prior similar reported criminal conduct at the premises, such as stabbings, shootings, robberies, and car

burglaries. Plaintiff essentially claimed that even though no identical acts had taken place, the occurrence of acts similar to those that had already been reported was reasonably foreseeable, supporting the imposition of a duty to provide a visible and additional security presence.

### B. Summary Judgment Motions

Following discovery, Defendants filed their motions for summary judgment on duty issues, each arguing they owed Plaintiff no duty to prevent the assault, because it was not reasonably foreseeable given the nature of the prior incidents that had occurred at the premises. Although prior theft-related and other criminal incidents had occurred in the parking lots, those incidents were not as serious nor sufficiently similar in nature to the current assault, so as to render the attack foreseeable, thereby giving rise to any duty to provide any additional security at the property.

Additionally, Defendant UTC's motion argued summary judgment was appropriate because any arguable breach of duty was not a legal cause of Plaintiff's injuries. UTC contended that without knowing the identity of the attacker, or his mental state or motive, there could be no basis to conclude whether any protective security measures would have prevented the attack. UTC suggested that the attacker was not concerned with being apprehended, since he stabbed Plaintiff during daylight hours in an occupied parking lot. UTC thus argued Plaintiff would not be able to prevail in showing any causation of her injuries from Defendants' actions or inactions.

In support of the motions, Defendants produced records of their security "incident logs," pertaining to reported incidents of theft and other problems at the UTC property

during the past five years. Of these, "incident reports" were prepared only for the more serious problems. These logs and reports were authenticated by declarations of the UTC general manager, Sherry Jones, and PSC's assistant director, Patrick Granados. Each described the working relationship that their companies have with the San Diego Police Department, including patrols and briefings, as well as regular mall safety meetings. Security cameras are located at the mall entrances from the public streets. Nordstrom provides its own security cameras at its entryways to Structure D.

Jones and Granados also outlined the general nature of security provided in the immediate vicinity of Structure D, which includes PSC patrols through the structure and the adjoining surface lots, approximately every half hour, and surveillance from one closed circuit camera that is attached to a nearby building's roof and is monitored by PSC personnel to capture suspicious or criminal activity. PSC will provide escort services for shopping center employees or tenants, on an as-available basis.

Jones's declaration stated that her review of these records and materials did not lead her to believe that any violent attacks on customers were likely to occur at Structure D. During the weeks leading up to the incident, there were no suspicious person reports made or shown on the logs. During the three years before the attack, she reported that there were incident reports for one purse snatching that had occurred inside the lower level of Structure D, as well as two others (one attempted) in the nearby surface lots. There had been one carjacking (of a mall employee's car, after she declined a PSC escort) and a robbery (beating and theft) in the adjacent parking areas. With respect to other incidents of assault or purse snatchings that had occurred in retail or other common

areas of the mall, Jones did not consider them similar enough to these circumstances to draw any conclusions about potential safety problems in the parking areas or Structure D in particular.

UTC also submitted the declaration and report of its security expert, Dr. Rosemary Erickson, a sociologist who analyzed the incident reports, criminal activity statistics in the area around the mall, and the circumstances of this attack. From those materials, and taking into account the security measures already in place at the mall, Dr. Erickson did not believe that Defendants were able to foresee that any violent assault upon a customer at Structure D was likely to occur.

In its motion, PSC also relied on the declarations of Jones and Granados, to argue PSC could not have had actual knowledge that this crime would have occurred, because no substantially similar violent crimes had occurred on the premises. According to PSC records, there were no reports of suspicious persons on the premises that day, or in the months before the incident. Also, the senior responding police officer, Sergeant Robert Gilbert, testified that he thought the assailant must have been "a nut" or crazy to act as he did. Accordingly, Sergeant Gilbert could not say that the incident would not have happened if there had been a visible video camera at the scene.

### C. Opposition Showing; Reply

Plaintiff argued that it would be appropriate to impose a duty on Defendants to provide additional, visible security at the site of the assault on her, because of the known prior similar criminal activity that was sufficient to make this attack in the parking lot reasonably foreseeable, on either a regular or "heightened foreseeability" basis. She

argued that even though criminal activity was always a possibility, Defendants had a duty to take simple steps to protect her from such third party criminal conduct, such as providing more visible security measures.

In her opposition and separate statement, Plaintiff provided attorney declarations and documents obtained through discovery to support her position that based on the reports of prior incidents of theft-related crimes around Structure D and the nearby parking areas, such as outer D lot and C lot, Defendants had the duty to provide additional security at the site. Based on analysis by her security experts, Plaintiff proposed two types of additional security measures: (1) providing and monitoring security cameras specific to Structure D, and providing roving security guards there or remotely activated intercoms and alarms at Structure D, to interrupt or deter any attacks; or (2) installing visible decoy or fake security cameras and surveillance signs on the premises.

In support of those suggestions, Plaintiff supplied expert analysis of the risks presented by the design of the parking structure. In his declaration, James Diaz, a professional security consultant, set forth his review of the incident logs and reports and the other evidence provided, and gave the opinion that this was an attempted carjacking that was thwarted by a good Samaritan. He noted that parking areas present a heightened security risk at shopping centers, because they are usually placed along the periphery of the property where there are few security personnel, and they are areas where people and valuables are concentrated.

Diaz also pointed out that there are limited numbers of access points into a parking structure, and that visible security measures can be provided at these points to project a deterrent effect, for several hundred dollars' cost. Diaz criticized the surveillance coverage at Structure D, because the limited number of access points were not monitored and the cameras provided at the street access to the mall and on the nearby building would not be readily noticeable to pedestrians, so as to provide any deterrent effect. Also, the camera was ineffective (poor quality of images) and the monitoring was insufficient. A state-of-the-art security camera surveillance system at Structure D would cost approximately \$50,000 to \$75,000. He gave the opinion that it was below the standard of care for Defendants to rely on so few guards to patrol all of the parking areas at the mall.

Plaintiff also provided expert analysis about criminal behavior and security measures in public areas, from UCLA Sociology Professor Jack Katz. He reviewed property management reports, records of UTC's and PSC's security incident logs and reports, police reports, Dr. Erickson's report, witness statements, and other evidence. The evidence showed that there was one security camera high up on a building across from Structure D, and it was not readily visible to users of the premises. According to Dr. Katz, theft crimes have a reasonable probability of escalating to assault. The single most important factor in deterring robberies and carjacking, and violent attacks growing out of them, is to visibly impede the offender's escape, such as by providing visible security cameras and signs, whether functional or decoys. He believed that more visible security, including decoy measures, would likely have had the effect of deterring criminal

behavior, and that such decoy measures would cost approximately a few hundred dollars and therefore were not unduly burdensome upon a landlord.

With reference to the security "incident logs" produced by defendants, Dr. Katz analyzed them by disregarding incidents that did not occur in the parking areas, as well as any incidents that had occurred between acquaintances or in retail spaces. Using those criteria, Plaintiff's experts and attorneys counted approximately 273 reports of theft and other problems at the UTC parking lots, such as vehicle burglaries and thefts, as shown in the incident logs from January 2003-February 2008 (when insufficiently similar theft incidents were disregarded). Plaintiff therefore considered these 273 theft incidents to be significant, because Dr. Katz gave his expert opinion that it is not unusual for nonviolent thieves to become personal confrontation offenders, especially when the offender encounters the property owner during the act. Dr. Katz believed that the fact that this offender fled without taking Plaintiff's car or other property indicates that he was young and inexperienced, and was improvising a crime in response to situational factors.

In particular, Plaintiff relied on five or six of the incident reports, during the past three years, as particularly significant and supporting a finding of foreseeability of a violent incident.<sup>2</sup> These included several purse snatchings and a robbery in which the

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<sup>2</sup> One of the incident reports described a 2003 parking lot confrontation in "lower D lot" in which one patron used pepper spray on another. On appeal, Plaintiff does not argue that this particular incident was similar enough to provide much in the way of foreseeability information. However, the trial court's order apparently relied on it, where it states that "[f]rom 2003 to the date of the subject incident, UTC was unaware of any violent crimes, including murders, rapes, or aggravated assaults, committed at Structure D."

victim was beaten up, which were reported as occurring either in the outer surface lot D, or in "lot D" (which is ambiguous terminology, such that the incidents could have taken place either in the parking structure or in the adjacent surface lot).<sup>3</sup> The attempted purse snatching at knife point took place in the lower level of Structure D. It was not disputed that the mall employee's carjacking occurred in surface lot C, diagonally across from Structure D.

According to Plaintiff, these five incident reports acted to place Defendants on notice that patrons of the retail establishments were at risk of violent or weapon-related encounters in the parking lot areas, particularly Structure D. Plaintiff did not consider the lack of physical injuries to all but one of those victims to be dispositive, because of the high possibility of injury in many personal confrontation crimes. Plaintiff also considered the 273 thefts described in the incident logs as taking place in the parking areas as significant, for the same reasons.

Plaintiff supplied her declaration describing the attack, and stating that she was familiar with the mall, which is in an affluent area of the county and which attracts many young female shoppers. She expected that such a mall would have had state-of-the-art security measures, both in retail areas and in the surrounding parking lots and structures. If she had known that there were few security measures in place at the parking structure

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<sup>3</sup> In reviewing defense summary judgments, we generally consider the facts shown in a light most favorable to the plaintiff as losing party. This suggests that the incidents which occurred in "D lot" should be considered to relate closely to the Structure D location. (*Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 274, fn. 2 (*Vasquez*).)

and that there had been past criminal activity throughout the mall parking facilities, she would have taken extra precautions to protect herself that day, such as traveling with a friend or parking closer to the Nordstrom entrance, rather than farther out in the lot.

In reply, Defendants each argued that the prior incidents were too dissimilar to the current attack to present adequate evidence of prior criminal conduct that would have placed Defendants on notice of a security problem. There are approximately 12 million visitors per year to this mall, and this was a highly unusual incident. Even Plaintiff did not originally realize that the attacker was dangerous, since she saw him but nevertheless returned to her car, where he attacked her. Defendants requested a finding that no duty should be imposed to provide additional visible security under these circumstances.

#### D. Ruling: UTC

Following oral argument, the court took the matter under submission. In its September 29, 2009 orders granting the defense summary judgments, the court overruled all evidentiary objections. The order begins by acknowledging: "A landowner/possessor has a duty to take appropriate measures to restrain conduct by third persons of which the possessor should be aware and that the possessor should realize is dangerous. [Citation.] Liability is imposed only where the possessor has reasonable cause to anticipate the misconduct of third persons; when the injury results from a sudden, intentional criminal act, which the possessor has no reasonable opportunity to anticipate or prevent, there is no breach of duty."

Next, the court applied the standards set forth in *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666 (*Ann M.*),<sup>4</sup> and in *Vasquez, supra*, 118 Cal.App.4th 269, 285, for determining the scope of a landowner's duty. This requires that "the foreseeability of the harm to be prevented must be balanced against the burdensomeness of the security measures provided by the landowner. [Citation.] First, the court must determine the specific measures the plaintiff asserts the defendant should have taken to prevent the harm. Second, the court must analyze how financially and socially burdensome these proposed measures would be to a landlord. Third, the court must identify the nature of the third party conduct that the plaintiff claims could have been prevented had the landlord taken the proposed measures, and assess how foreseeable it was that this conduct would occur. The more certain the likelihood of harm, the higher the burden a court will impose on a landlord to prevent it; the less foreseeable the harm, the lower the burden a court will place on a landlord."

In analyzing the facts, the trial court initially noted that Plaintiff is seeking to impose on Defendant UTC "a duty to provide and monitor security cameras at Structure D, and to provide roving security guards or remotely activated intercoms and alarms at Structure D." The court then evaluated these proposed security measures as imposing at least a "moderate" financial burden on Defendant UTC (of around \$50,000 to \$75,000, not including the cost of employing security personnel to monitor the cameras, or if a

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<sup>4</sup> *Ann M., supra*, 6 Cal.4th 666, was recently disapproved in other part in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527, footnote 5.

remote controlled intercom or alarm system were not used, the cost of employing an individual to conduct roving patrols in the vicinity of Structure D).

Next, the trial court considered "the foreseeability that an attack such as the one Plaintiff suffered would occur at Structure D, [noting] a high degree of foreseeability is required in order to find that the scope of the landlord's duty of care includes the hiring of security guards . . . [and] the requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises . . . .' (*Ann M.*, *supra*, 6 Cal.4th at [p.] 679.)"

In evaluating the respective showings on the motion, the trial court concluded that no substantially similar violent crimes had been shown to have occurred at Structure D. The court set forth this analysis: "From 2003 to the date of the subject incident, UTC was unaware of any violent crimes, including murders, rapes, or aggravated assaults, committed at Structure D. There was one purse snatching that occurred in May 2007 on the first level of Structure D; however, no weapon was used and the victim was not injured."

The trial court rejected Plaintiff's arguments that there were at least four or five other incidents, in the past three years, that were so similar to her attack as to support a foreseeability determination that would give rise to a duty to take additional security measures (to be discussed in more detail, *post*). In particular, the court found those incidents to be distinguishable on several bases: Only two involved a weapon (robbery at knifepoint and carjacking with a gun), only one involved physical injury to the victim (elderly man beaten and robbed in the outer D surface lot), several took place in the

outer D lot alongside Structure D, or in the C surface lot directly and diagonally across from it (purse snatchings, carjacking).

Next, the court concluded that since the single (May 2007) incident that did occur inside Structure D did not involve a weapon or physical injury to the victim, none of the prior incidents was similar enough. "Thus, from the evidence presented, the court finds the attack on Plaintiff was not foreseeable given the prior incidents at Structure D."

In conclusion, the trial court stated that when the foreseeability of the harm to be prevented was balanced against the burdensomeness of Plaintiff's proposed security measures, then "UTC had no duty to implement the additional security measures at Structure D as proposed by Plaintiff."

#### E. Ruling: PSC

In its September 29, 2009 order granting summary judgment to PSC, the court followed the same reasoning outlined above, adding that as to PSC, the alleged duties would likewise be applicable to agents or employees of the landowner/possessor: "A security company hired to protect business premises owes no greater duty toward the patrons of that business than is owed by the landowner or proprietor under relevant principles of premises liability law." It was undisputed that PSC, a private security company, contracts with Defendant UTC to provide security services to the shopping center.

After following the same duty analysis outlined above, the court concluded: "In balancing the foreseeability of the harm to be prevented against the burdensomeness of Plaintiff's proposed security measures, the court concludes UTC had no duty to

implement the additional security measures proposed by Plaintiff at Structure D. Since PSC owes no greater duty to Plaintiff than is owed by Defendant UTC, PSC also owed no duty to Plaintiff."

These rulings and summary judgments disposed of the entire action as to these Defendants. Plaintiff appeals.

## DISCUSSION

### I

#### *ISSUES PRESENTED*

Plaintiff contends the trial court erred in granting the summary judgment motions because it failed to recognize that the evidence supported a conclusion that Defendants owed her a duty of reasonable care to provide visible security measures at the site. She suggests that the character of Structure D, when combined with other known factors and circumstances, made criminal activity of escalating theft-related conduct reasonably foreseeable at that location. Foreseeability in a given case may be evaluated as extending "from a mere possibility to a reasonable probability." (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1214 (*Castaneda*).) Plaintiff would find a third party assault at Structure D was reasonably foreseeable, mainly based on the incident logs and her experts' analysis of them, showing over 270 theft-related crimes in UTC parking lots in the five years preceding this attack, and more specifically, upon the incident reports of five "personal confrontation crimes" of theft that took place in and around Structure D, within three years of this attack.

In response, UTC formulates the question before the court as whether it was foreseeable that a violent criminal assault would occur at Structure D, in particular, in the absence of decoy or fake surveillance cameras and security signs at that location (or other security measures). UTC contends that the parking lot incident logs of 270-plus theft reports, and the five incident reports of personal confrontation crimes, as analyzed by its security expert and as a matter of law, do not supply enough evidence to support any finding that the subject incident was foreseeable, and additionally, since nothing is known about the assailant's motives, it cannot be evaluated whether anything more than a "mere possibility" could reasonably be anticipated.

Likewise, PSC argues it should not be legally obligated to protect Plaintiff from third party criminals, because the incident logs and incident reports created by or available to it, or the landowner UTC, were insufficient to place it on any notice to justify creation of such a tort duty. Also, as a retained security firm, PSC argues it did not have the authority nor any obligation under its contract to install cameras or signs at the premises, as suggested by Plaintiff. (But see *Balard v. Bassmann Event Security Inc.* (1989) 210 Cal.App.3d 243, 249-250 (*Balard*) [liability of hired security company is "coterminous" with the business's liability].)

To evaluate these arguments, we set forth established rules of review and outline the principles developed for imposing such legal duties upon landowners in such a factual context. As we will explain, our conclusions on duty make it unnecessary to discuss the causation issues at this stage of the proceedings.

## II

### *APPLICABLE LEGAL STANDARDS*

#### A. Summary Judgment Standards

In appeals from summary judgments, we review the court's ruling on the motion de novo. (*Lunardi v. Great-West Life Assurance Co.* (1995) 37 Cal.App.4th 807, 819.) In doing so, we "apply the same rules and standards that govern a trial court's determination of a motion for summary judgment." (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1258.) Summary judgment should be granted if "all the papers submitted show that there is no triable issue of material fact and . . . the moving party is entitled to judgment as a matter of law." (§ 437c, subd. (c).)

To satisfy its burden, a moving defendant is not required to "conclusively negate an element of the plaintiff's cause of action. . . . All that the defendant need do is to 'show[] that one or more elements of the cause of action . . . cannot be established' by the plaintiff." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853 (*Aguilar*).) Once this defendant's burden is met, the "burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists . . . ." (§ 437c, subd. (p)(2).)

On de novo review, we view the evidence in the light most favorable to the plaintiff, liberally construing the plaintiff's submissions and strictly scrutinizing the defendant's showing, and resolve any evidentiary doubts or ambiguities in plaintiff's favor. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; *Vasquez, supra*, 118 Cal.App.4th at p. 274, fn. 2.) "Summary judgment will be upheld when, viewed in such a light, the evidentiary submissions conclusively negate a necessary element of plaintiff's

cause of action, or show that under no hypothesis is there a material issue of fact requiring the process of a trial, thus defendant is entitled to judgment as a matter of law." (*Thompson v. Sacramento City Unified School Dist.* (2003) 107 Cal.App.4th 1352, 1360-1361.)

## B. Basic Legal Principles on Duty

Extensive case law is constantly being issued in this difficult area of determining the existence and scope of duty owed by business owners to take measures geared toward protecting their invitees from the criminal acts of third parties. (See *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 250-251 (dis. opn. of Kennard, J.).) This court has recently tackled these issues in cases such as *Vasquez, supra*, 118 Cal.App.4th 269, and *Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519 (*Ambriz*). In *Ericson v. Federal Express Corp.* (2008) 162 Cal.App.4th 1291, 1299-1305 (*Ericson*), this court laid out the factual bases underlying recent Supreme Court authorities that have closely examined these issues, and we will not repeat the reported details of the attacks giving rise to each of those plaintiffs' cases, and will instead focus upon the basic elements of the theoretical framework developed.

"Ordinarily, there is no duty to protect others from third party criminal activity. [Citation.] Courts, however, 'have recognized exceptions to the general no-duty-to-protect rule,' one of which is the ' "special relationship" doctrine.' [Citation.] 'Courts have found such a special relationship in cases involving the relationship between business proprietors such as shopping centers, restaurants, and bars, and their tenants, patrons, or invitees.' [Citation.] Based on the special relationship, 'commercial

proprietors . . . are required to "maintain land in their possession and control in a reasonably safe condition" and . . . this general duty includes taking "reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures." ' [Citation.]" (*Ericson, supra*, 162 Cal.App.4th at p. 1300; see *Ann M., supra*, 6 Cal.4th 666, 678 ["the scope of the duty is determined in part by balancing the foreseeability of the harm against the burden of the duty to be imposed"]); also see *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1188 (*Sharon P.*), disapproved on other grounds in *Aguilar, supra*, 25 Cal.4th at p. 853, fn. 19.)

In *Sharon P., supra*, 21 Cal.4th 1181, the court declined to impose a landowners' duty to provide additional security in a case in which the plaintiff was sexually assaulted by an unknown assailant, in a commercial building's underground parking garage, below a bank which had been robbed repeatedly. The problem in that case was that there was insufficient evidence in that record of the foreseeability of a violent attack, to justify using a heightened foreseeability test, because: (1) sexual assault is not a reasonably foreseeable risk associated with the previous bank robberies; (2) there was no other evidence of crimes against property or persons on the premises; (3) underground parking garages are not inherently dangerous so as to require security guards, and (4) the defendants were not required to undertake other proposed measures (improving lighting and cleanliness in the garage, requiring other employee walk-throughs, or providing operative security cameras), because it was not shown those measures were actually less burdensome than hiring security guards, nor that they would have protected against the sexual assault. (*Id.* at pp. 1196-1197.)

In *Sharon P.*, *supra*, 21 Cal.4th 1181, the court acknowledged that even where there is no evidence that prior similar crimes took place on the premises owned by the defendants, foreseeability can nevertheless be found where there were other circumstances to provide a heightened degree of foreseeability (including similar violent crimes occurring at a neighboring similar business establishment). (*Id.* at pp. 1196-1197; *Delgado*, *supra*, 36 Cal.4th at p. 240, fn. 19.)

In *Delgado*, *supra*, 36 Cal.4th 224, 247, footnote 27, the majority opinion sought to clarify that in making duty determinations, courts do not require predictability of the exact kind or form of criminal conduct that actually occurred. Rather, "[i]t is well established that the scope of a defendant's duty in this context is premised upon the danger that the defendant knows or reasonably should anticipate, and that the defendant's duty is simply to take reasonable steps in light of those circumstances. As a matter of logic, it is difficult to understand how the existence or scope of a proprietor's duty properly could depend upon the nature of the criminal conduct 'that actually occurred,' rather than the danger of which the defendant was or should have been aware." (*Ibid.*; italics omitted.)

Accordingly, "[p]erfect identity of prior crimes to the attack on plaintiff is not necessary." (*Tan v. Arnel Management Co.* (2009) 170 Cal.App.4th 1087, 1101 (*Tan*).) "The court's task in analyzing the foreseeability aspect of duty 'is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may

appropriately be imposed on the negligent party.' [Citations.]" (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1219 (dis. opn. of Epstein, J.) (*Alvarez*).)

In *Castaneda, supra*, 41 Cal.4th 1205, 1214, the Supreme Court drew from previous case law, such as *Ann M., supra*, 6 Cal.4th 666 and *Sharon P., supra*, 21 Cal.4th 1181, to outline this three-part analytical test for legal duty questions: " 'First, the court must determine the specific measures the plaintiff asserts the defendant should have taken to prevent the harm. This frames the issue for the court's determination by defining the scope of the duty under consideration. Second, the court must analyze how financially and socially burdensome these proposed measures would be to a landlord, which measures could range from minimally burdensome to significantly burdensome under the facts of the case. Third, the court must identify the nature of the third party conduct that the plaintiff claims could have been prevented had the landlord taken the proposed measures, and assess how foreseeable (on a continuum from a mere possibility to a reasonable probability) it was that this conduct would occur. Once the burden and foreseeability have been independently assessed, *they can be compared in determining the scope of the duty the court imposes on a given defendant.* The more certain the likelihood of harm, the higher the burden a court will impose on a landlord to prevent it; the less foreseeable the harm, the lower the burden a court will place on the landlord.' " (*Castaneda, supra*, at p. 1214, citing *Vasquez, supra*, 118 Cal.App.4th 269, 285; italics added.)

### C. Limitations on Issues Presented

In *Vasquez, supra*, 118 Cal.App.4th at page 280, we framed the issue of law in determining a landlord's duty as "not whether a duty exists at all, but rather what is the scope of the landlord's duty given the particular facts of the case," i.e., to take which specific steps, under a given set of circumstances, "to maintain the property's safety to protect a tenant from a specific class of risk." (*Ibid.*; italics omitted.) In this process, "[a]lthough duty is a legal question, the factual background against which we decide it is a function of a particular case's procedural posture." (*Castaneda, supra*, 41 Cal.4th 1205 at p. 1214.) Here, summary judgments are on review, and the court's ruling expressly dealt only with the duty issues, and only specified certain proposed security measures as unduly burdensome. It is well accepted that we review the ruling and not the rationale of the trial court. (*Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329.)

Along those lines, we observe that Plaintiff's briefing on appeal appears to be limited to arguing only one of the two grounds on which she opposed the motions in the trial court. That is, she now contends that Defendants collectively had the duty to install visible decoy or fake security cameras and surveillance signs on the premises. In the briefs, Plaintiff notes that the trial court did not address that ground in its order, but instead, only expressly analyzed her other opposition theory (i.e., that Defendants had a duty to provide and monitor operative security cameras at Structure D, and to provide roving security guards or remotely activated intercoms and alarms at Structure D). The trial court concluded that these proposed operable security measures were unduly burdensome, when balanced against the foreseeability of the harm to be prevented,

because the court did not evaluate the five prior incidents, in the incident reports, to be sufficiently similar so as to demonstrate any foreseeability of the attack on Plaintiff. In this review of the record, de novo, we need not limit the analysis to the terms of the trial court's order, and should properly address both types of proposed security measures.

We also take note that we have been given no basis to interpret the UTC/PSC contractual arrangement for security, for purposes of separately imposing negligence or contract based duties, with regard to Plaintiff's allegations. It is customary in premise liability cases to treat a retained security firm the same as the business which hires it, for purposes of assessing tort liability. (*Balard, supra*, 210 Cal.App.3d 243, 249-250 [tort liability of hired security company "coterminous" with employer's liability].)

In applying standards for imposing a duty on a landowner, we seek to emphasize that the unusual situation presented in *Delgado, supra*, 36 Cal.4th 224, is not supported by the record before us, for purposes of finding a duty inherent in the special relationship between a landowner and users of the premises, based on specific knowledge of "unfolding circumstances." (*Id.* at pp. 245-247.) That unusual situation was deemed to support a finding of duty, in that the agents of the proprietor had knowledge sufficient to support imposition of a duty to provide protective measures, for the following reasons. In *Delgado*, the special relationship of a tavern proprietor and its security agents, to a patron, was present and resulted in a finding of a duty to respond to certain "unfolding events" that obviously posed a threat to the patron. The Supreme Court analyzed those undisputed facts as justifying the existence of the proprietor's duty to take "reasonable, relatively simple and minimally burdensome steps to attempt to avert that danger." (*Id.* at

pp. 249-250.) There, the high court did not reach the issues of breach of duty or causation of harm, instead sending them back to the lower courts for analysis of certain remaining foreseeability considerations. (*Id.* at p. 250.)

UTC also argues such factual causation issues in its motion and on appeal. However, we address duty issues only at this stage of the proceedings. The attack upon this Plaintiff took place in the matter of a few minutes, and cannot be said to have occurred in stages such as in *Delgado, supra*, 36 Cal.4th 224. It is not realistic to characterize this record as showing there was an "unfolding" sequence of events of which agents of the landowner could have been readily aware, so as to support any duty conclusions. Instead, we must analyze the question of duty with reference to the degree of knowledge Defendants had gained about prior incidents of personal confrontation criminal conduct toward patrons in the parking areas, related to thefts, and this duty question may be dispositive. For our purposes, we analyze duty without reference to subsequent causation questions.

With these limits in mind, we describe the specific measures the Plaintiff proposes, and then assess their burdensomeness upon landowners. We can then pursue the balancing process outlined above, to evaluate the trial court's conclusions on foreseeability, or the lack thereof.

### III

#### *DUTY FACTORS*

##### A. Plaintiff's Proposed Measures v. Burdensomeness of Implementation

As a threshold matter, we do not base our conclusions about duty on the given fact that these Defendants have already undertaken some duties to carry out security guard and surveillance functions in the parking areas, including Structure D. Case law instructs us in such premises liability cases that we are to avoid that alternative analysis, that a duty was arguably created when Defendants voluntarily undertook to operate security measures, but did so negligently. (*Tan, supra*, 170 Cal.App.4th 1087, 1101; *Alvarez, supra*, 100 Cal.App.4th 1190, 1212.) Thus, a plaintiff in this kind of premises liability lawsuit may not characterize her claim "as one for negligent undertaking of a duty.

[Citation.] . . . '[P]laintiffs cannot attempt to circumvent governing decisional law about a commercial enterprise's liability for criminal acts by recasting their claim in some other subtheory of negligence. The dispositive issue remains the foreseeability of the criminal act. Absent foreseeability of the particular criminal conduct, there is no duty to protect the plaintiff from that particular type of harm.' " (*Tan, supra*, at p. 1101 citing *Alvarez, supra*, at p. 1212; *Ericson, supra*, 162 Cal.App.4th at pp. 1309.)

In her opposition to both summary judgment motions, Plaintiff sought to impose two forms of duties on Defendants, to go beyond what had been done, by (1) providing enhanced and increased security measures such as monitors and alarms, or more roving patrols, and/or (2) installing decoy cameras and signs. The trial court found no duty to

install any additional security measures, of either type. This record requires us to take into account both forms of Plaintiff's proposed duties of installing visible security.

PSC argues that the only protective measure that could have prevented this assault, having security guards escort patrons through the entire parking lot, is unduly burdensome and cannot support any imposition of a duty. That is not what Plaintiff is requesting, and that is not what is before us. We are cognizant that landowners are not insurers of the public safety, and can only be required to take reasonable measures against foreseeable risks. (*Sharon P.*, *supra*, 21 Cal.4th at pp. 1190-1191.) Here, as recommended by Plaintiff's experts, she seeks a duty to provide either minimal decoy measures (a few hundred dollars), or operable "state-of-the-art security measures," at a cost of around \$50,000-\$75,000, at the Structure D location.

We next inquire how financially and socially burdensome the proposed measures would be to a landlord. "Various case-specific factors may come into play in making this determination, including the size of the property in question. (See *Pamela W. v. Millson* (1994) 25 Cal.App.4th 950, 958 [what is a minimal financial burden for owner of large apartment building may be a significant burden for owner of a smaller one].)" (*Vasquez*, *supra*, 118 Cal.App.4th 269, 285, fn. 9.) This is a large commercial mall, presumably able to afford either of the projected costs of the proposed security items. For example, these measures are less burdensome than the ones disallowed in *Castaneda*, *supra*, 41 Cal.4th 1205, in which the plaintiff sought to have the landlord of a rental complex hire security guards and/or evict gang member tenants, even before they were known to have perpetrated offenses. (See *id.* at pp. 1219-1221; *Rinehart v. Boys & Girls Club of Chula*

*Vista* (2005) 133 Cal.App.4th 419, 435 [expense of providing additional supervisors in playground area to avoid random rock throwing from elsewhere unlikely to be justifiable].)

Plaintiff's proposed security measures, combined with their relative lack of burdensomeness, should not be ruled out as potentially supporting a finding that Defendants have a duty of reasonable care to provide visible security at Structure D, as based on the character and function of Structure D, when considered with other known factors and circumstances. The next part of the analysis considers foreseeability of particular kinds of harm. (*Vasquez, supra*, 118 Cal.App.4th at p. 286.)

#### B. Foreseeability Factors

The Supreme Court's formulation of the applicable analysis in *Delgado, supra*, 36 Cal.4th at page 237 instructs us that although foreseeability is a critical factor in a duty analysis, it remains a question of law. "Moreover, foreseeability depends not on whether a particular plaintiff's injury was foreseeable as a result of a particular defendant's conduct, but instead on whether the conduct at issue created a foreseeable risk of a 'particular kind of harm.'" [Citations.] (*Vasquez, supra*, 118 Cal.App.4th 269, 286.)

To ask if the proposed measures arguably would have prevented the harm ultimately suffered, we define that harm generally, not specifically. The risk of harm created by the allegedly inadequate security measures in place at Structure D may generally be defined as a third party violent attack upon a patron in the Structure D parking area, or in its adjacent surface lots, that is likely related to theft, during operating hours of the mall.

Under that definition of the harm, it cannot be dispositive, as it was in *Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138 at page 1143, that this attack was a " 'highly absurd and bizarre' " occurrence (there, a man driving his car over a four-foot fence into playground area). In *Wiener*, other than a separate freak traffic accident, there had been no evidence the day care center perimeters had ever been breached by a vehicle, over its four-foot fence. There had never been any evidence the day care center was the target of violence. (*Id.* at pp. 1147, 1150.) In our case, the injury-causing event suffered by Plaintiff, while extremely bizarre, was not completely unlike the carjacking near Structure D that had been reported, nor the purse snatchings (one at knife point), nor the robbery with fists as weapons. On a continuum from a mere possibility to a reasonable probability, conduct resembling an escalated theft incident might well occur in an area devoid of readily visible security measures. (*Vasquez, supra*, 118 Cal.App.4th at p. 286.)

Regarding the factor of location, in *Tan, supra*, 170 Cal.App.4th 1087, 1100, footnote 6, it was not deemed dispositive that none of the prior violent incidents occurred in the very same parking lot where that plaintiff was attacked, and it was enough for a foreseeability finding that the expert analysis of similar crimes relied on those occurring in parking lots, not in all other common areas. (*Ibid.*; see *Claxton v. Atlantic Richfield Co.* (2003) 108 Cal.App.4th 327, 339 [discussing crime in the area].) Here too, Plaintiff's experts correctly drew their conclusions from selected evidence of theft-related personal confrontation offenses in adjacent parking areas (incident reports), or thefts in general

parking areas (incident logs), not those in the overall mall retail spaces and transit centers.

Also in *Tan*, the court's observation about the factor of weapon use is well taken, that: "It is of no moment that the assaults were not committed with guns where they nonetheless inflicted great bodily injury. Plaintiffs demonstrated a reasonably foreseeable risk of violent criminal assaults on the property." (*Tan, supra*, 170 Cal.App.4th at p. 1100.) Here too, these prior incidents are not sufficiently distinguishable to prevent any foreseeability effect, merely because only one involved a knife, only one involved a gun, one involved beating with fists, and overall, there were no serious physical injuries inflicted (other than the beating), until Plaintiff was stabbed. Landlords are not required to see into the future, but instead to respond to known risk factors in a reasonable manner. (*Delgado, supra*, 36 Cal.4th at p. 247, fn. 27.) Defendants' expert Erickson took crime statistics in the community into account in her report. In light of these established standards, we continue with the duty analysis, again without reference to potential causation issues and problems.

#### IV

##### *REQUIRED BALANCING PROCESS: DUTY*

At this point, we seek to clarify that we interpret this record as demonstrating a case of "regular" foreseeability, as opposed to "heightened foreseeability" of risk of this harm. As those concepts are described in *Delgado, supra*, 36 Cal.4th at page 243 and footnote 24, when a court analyzes a given set of facts, it may be able to find there was "heightened foreseeability" of harm, as shown by prior similar criminal incidents or other

indications of a reasonably foreseeable risk of violent criminal assaults in that location.

Only where such heightened foreseeability is demonstrated will the courts make a finding of duty to take protective measures that are "great or onerous." (*Ibid.*)

In applying this "sliding-scale balancing formula" (*Delgado, supra*, 36 Cal.4th at p. 243, fn. 24), we believe that this record supports a conclusion that based on the information available about a number of third party personal confrontation theft-related offenses committed upon patrons of the mall in the vicinity of Structure D, together with information about the design of the parking structure and about theft crimes that have a reasonable probability of escalating to assault, these Defendants were on notice of facts supporting a level of " 'regular' reasonable foreseeability as opposed to heightened foreseeability. . . ." (*Ibid.*; italics added.) Where such significant data about criminal conduct is available to the landowner, arguably putting the owner on notice that patrons may be subject to a particular risk of harm on the property, and where such "harm can be prevented by simple means or by imposing merely minimal burdens," (*id.* at p. 238), then courts may be required to determine that the scope of such duty will include taking reasonable measures to attempt to provide protections against the occurrence of third party crime. (*Id.* at p. 237, fn. 15.)<sup>5</sup>

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<sup>5</sup> In addition to assessing foreseeability, courts are required to take into account other factors for determining the existence and scope of a duty, as they are laid out in *Rowland v. Christian* (1968) 69 Cal.2d, 108, 113: "[T]he degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the

According to the court in *Delgado*, the most important consideration in establishing duty is foreseeability, although other factors may indicate the inappropriateness of expanding the scope of a landowner's duty. (*Delgado, supra*, 36 Cal.4th at p. 237, fn. 15.) We next analyze several other factors and problems presented by this record, regarding the imposition of a duty based on "regular" reasonable foreseeability.

#### A. Factors: Circumstances at the Premises

In a regular reasonable foreseeability case, " 'If injury to another ' "is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct" ' [citations], we must label the injury 'reasonably foreseeable,' " ' " and go on to balance other recognized duty considerations. (*Ericson, supra*, 162 Cal.App.4th at p. 1303, citing *Rowland v. Christian, supra*, 69 Cal.2d 108.) We seek to evaluate generally " 'whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party.' " (*Alvarez, supra*, 100 Cal.App.4th 1190, 1219 (dis. opn. of Epstein, J.).)

Case law provides guiding criteria for evaluating any risk from third party criminal conduct, likely to be posed by the conduct at issue. Several cases deal with the general concept of maintaining perimeter security in a dwelling (*Vasquez, supra*, 118 Cal.App.4th 269, 286 [defective door]; *Ambriz, supra*, 146 Cal.App.4th 1519 [defective

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community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved."

locks].) In such cases, the problem is that the landowner failed to maintain "the 'first line of defense' against intruders." (*Vasquez, supra*, at p. 286.) Where a plaintiff's proposed duty for landowners (to fix the door or locks after requests) is minimally burdensome, this militates in favor of imposing that duty on the owners, because that is a "reasonable" burden. (*Id.* at p. 279 ["what is reasonable will depend in each case on the particular circumstances facing that defendant considering the foreseeability of the risk of harm balanced against the extent of the burden of eliminating or mitigating that risk"].)

Our case is more like cases involving public areas, such as *Tan, supra*, 170 Cal.App.4th 1087, 1091-1092. That plaintiff was carjacked at a parking lot at his apartment complex, and was grievously injured in the process. There had been three prior incidents "of sudden, unprovoked, increasingly violent assaults on people in ungated parking areas on the [complex] premises by strangers in the middle of the night, causing great bodily injury." (*Id.* at p. 1099.) The Court of Appeal analyzed the three prior similar incidents as substantially similar, thus giving rise to reasonable foreseeability, and evaluated the proposed protective measures as minimally burdensome (providing parking lot gates on the entrance roadway, on the theory that "anything that could effectively deter escape is going to help reduce . . . the probability of a carjacking occurring"). (*Id.* at p. 1093.) The court found it was appropriate to impose on those defendants a duty to provide the comparatively minimal security measures the plaintiffs proposed, because there were sufficient "indications of a reasonably foreseeable risk of violent criminal assaults on the property." (*Id.* at p. 1100.)

In another case involving parking lots, *Ericson, supra*, 162 Cal.App.4th 1291, this court declined to find sufficient foreseeability of an assault, for purposes of imposing duties, such as providing additional minimal security measures. The circumstances were that the plaintiff's decedent, a truck driver, was required to park his personal car and work truck in a dimly lit rear portion of defendants' unfenced and dimly lit parking lot, which was frequented by transients. However, these transients were not known to be aggressive or threatening, nor were they known to be responsible for thefts in the area (that instead appeared to be made by employees). Unfortunately, the plaintiff's decedent was assaulted one night while returning to his assigned parking space. (*Id.* at pp. 1299-1035.) This court found that a few sightings of nonthreatening transients at the property did not satisfy the standard of providing any regular or heightened foreseeability about actual risks of assault at the lot, nor were the unrelated theft incidents deemed significant. (*Id.* at pp. 1305-1307.) We also found the negligent undertaking doctrine was inapplicable, because the security measures provided were not shown to increase any risk of harm to the decedent. (*Id.* at pp. 1309-1310.)

In *Wiener*, the third party criminal conduct that occurred upon the business owner's land (i.e., driving through a four-foot fence and killing preschool children), was so "bizarre and outrageous" that the requisite degree of heightened foreseeability was absent, for purposes of imposing landowner duties to protect against such third party criminal conduct (e.g., building "a fortress" to protect the children). (*Wiener, supra*, 32 Cal.4th at pp. 1150-1151.)

In *Wiener*, the court went on to discuss whether that factual context should instead be analyzed in terms of ordinary landlord negligence, requiring an evaluation of the "kind of harm" the day care occupants suffered. The court examined the physical features of the premises, and then distinguished another case in which "the property's physical layout, traffic pattern, and inviting recreational area, made an injurious automotive intrusion on the proximately located picnic area foreseeable." (*Wiener, supra*, 32 Cal.4th at pp. 1150-1151, citing to *Robison v. Six Flags Theme Parks, Inc.* (1998) 64 Cal.App.4th 1294.) In contrast, the Supreme Court noted that the only previous injurious incident in the day care case before it "could have occurred anywhere, at any time. That fact, together with the evidence indicating the physical layout of defendants' fence and the playground had adequately protected the children against all other intrusions, was simply inadequate to make any automobile intrusion through the fence foreseeable. Although, as we observed in *Sharon P., supra*, 21 Cal.4th at page 1197, some types of crime might be foreseeable without prior similar incidents, so that a simple security measure might deter a particular act, or foreseeability might be shown by the occurrence of similar nonidentical events, this is not such a case." (*Wiener, supra*, at pp. 1150-1151.) There was no basis in *Wiener* to impose a premises liability duty of reasonable care to prevent a perpetrator's unpredictable, murderous act.

#### B. Special Problems Presented by This Record; Application of Rules

In our case, Plaintiff's experts Diaz and Katz relied on their review of the evidence, including the design of Structure D, and its vehicle and pedestrian access, to conclude that visible security measures can be effective in deterring criminal activity,

because they deter escape and also provide an opportunity to identify the wrongdoer. It is not contended that these Defendants had any duty to undertake extremely burdensome measures to prevent such an assault, such as having security guards escort patrons through the entire parking lot. Instead, the record supports a finding that some duty to provide visible security measures exists. At Structure D, there were essentially no visible security measures (except one camera atop a nearby building), so when Plaintiff requests "additional" ones, Plaintiff is merely reiterating the alleged duty to provide any visible security measures. We decline to specify whether this duty is one of providing either "fake" and/or operative measures, since that question properly goes more to fact-specific issues about the degree of reasonable care to be exercised in pursuit of fulfilling a duty.

Applying the required balancing test to the present facts, we cannot agree with the trial court that Defendants owed no duty to Plaintiff to provide visible security measures, simply because of the distinguishing factor that this assault was so bizarre and extreme, when compared to prior known incidents at the immediate vicinity. The events leading up to this assault could be reasonably evaluated as a potential theft or carjacking that went bad, as suggested by the experts, whether this particular assailant was unstoppable or not. These Defendants were in possession of evidence indicating the Structure D parking area, including its immediately adjacent surface lots, had in fact been a host for at least five relatively serious criminal theft and robbery incidents in the three years before the attack. We cannot say the foreseeability of a perpetrator's commission of an assault upon a mall patron, while the patron was unloading her car for mall business, was impossible to anticipate, nor that any escalating theft offense in the vicinity could not

have been reasonably anticipated under any circumstances. We think that the analysis and result in *Wiener, supra*, 32 Cal.4th 1138, 1150, are distinguishable, because in that case, there had been no prior incidents of violence at the premises, and nothing about the property's four-foot fence was inadequate under the circumstances or contributed to the harm.

Whether we focus on the available information about third party confrontational criminal conduct in this area in its most generalized form, or on the kind of harm suffered by Plaintiff, we can assess them both as providing some reasonable amount of foreseeability (more than a mere possibility, up to a reasonable probability) that this kind of severe, violent personal confrontation third party conduct might occur, that is related to patrons' use of their cars at these mall parking areas in the process of availing themselves of mall facilities, in the absence of visible security measures that could possibly act to reduce the chances of such criminal conduct, whether in terms of deterrence or potential detection of offenders.

### C. Remaining Issues

In *Delgado, supra*, 36 Cal.4th 224, 247, footnote 26, the majority opinion distinguished between the evidentiary analysis, under a given set of circumstances, about (1) the preliminary, legal determination of whether a defendant owed a duty of care to a plaintiff, or (2) the factual findings necessary to demonstrate a breach of such a duty, and/or determinations about substantial factor causation of harm. Thus, even if the evidence might show such a duty existed, and it was then performed to some extent, there might remain significant factual issues on whether the ultimate injury to the plaintiff

would not have occurred as alleged, for purposes of determining whether a breach of duty or causation of injury could be proven against a defendant.

In *Tan, supra*, 170 Cal.App.4th 1087, 1099, footnote 5, the court noted that whether the proposed security measures (the subject of the duty determination, adding parking lot gates) "would feasibly have prevented the crime, as defendants contest, goes to the question of causation," and this factor is not a relevant issue in proceedings limited to the duty element of a negligence cause of action.

With respect to the trial court's ruling on duty alone, our conclusion is that the five prior incidents of serious, theft-related personal confrontation offenses in Structure D and the immediate parking vicinity were not completely distinguishable on their facts, and that the court should instead have concluded Defendants had a duty to provide visible security measures at a reasonable level, in light of all the circumstances known to them. We reverse the summary judgment granted on duty grounds, while expressing no opinion on the issues of breach of duty or causation of injury. Those elements of Plaintiff's claim, including the reasonableness of the visible security measures that were in place on the day of the attack, remain to be fleshed out on a fact-specific basis.

#### DISPOSITION

The summary judgments granted on duty grounds alone are reversed with directions to deny the motions and to allow further appropriate proceedings with respect

to remaining issues concerning any breach of duty and causation of injury and damages.

Defendants to pay Plaintiff's ordinary costs on appeal.

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HUFFMAN, Acting P. J.

WE CONCUR:

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NARES, J.

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O'ROURKE, J.